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Nos. 90-1604 and 90-1606

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DAN MORALES, Attorney General of Texas, *et al.*,
Petitioners,

v.

TRANS WORLD AIRLINES, INC. *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL MEMORANDUM

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SUPPLEMENTAL MEMORANDUM

Respondents submit this supplemental memorandum in response to the Acting Solicitor General's brief for the United States as *amicus curiae*.

INTRODUCTION

The United States, like the Fifth Circuit, concludes that "Section 105(a) of the Airline Deregulation Act of 1978 preempts the use by [the States] of [their] consumer protection laws to enforce the *NAAG Guidelines* against airline fare advertisements." U.S. Br. 7. This

conclusion, which is soundly rooted in an analysis of the statutory text and legislative history, draws further support from the striking and pervasive conflict that currently exists between federal and state regulatory policies relating to air fare advertising. *Id.* at 8-12, 9a-41a. Because the decision below was correct and "[t]here is no federal appellate decision to the contrary," *id.* at 7, the United States agrees with respondents that the issue of preemption presented by this case does not warrant further review.

The United States argues, however, that the Fifth Circuit erred in treating as intervenors the 33 States that participated in the proceedings in district court by filing pleadings, requesting and opposing relief, and appearing through counsel at oral argument. Although "recogniz-[ing] that the ruling below turns on the facts of this case and that the factual situation in this case is unusual, which ordinarily would mean that the Fifth Circuit's error would not warrant correction by this Court," *id.* at 22, the United States nonetheless urges the Court to take the extraordinary step of summarily reversing, apparently for no reason other than that the petitioners are States rather than private litigants. *Id.* at 23-24. But the Fifth Circuit's holding with respect to intervention is not merely tied to particular and peculiar facts; it also is manifestly correct as a matter of law. The United States' contention that the Fifth Circuit should be summarily reversed because it "clearly erred," U.S. Br. 8, 14, borders on frivolity.

ARGUMENT

1. The United States begins with the claim that the decision of the 33 States to participate in the proceedings in district court was a "reasonable and prudent" defensive measure. U.S. Br. 14. It was nothing of the kind. The States had not been named as defendants, nor had they been served with process. As long as they kept their distance, they could not be bound. It is a fundamental rule of due process that "[u]nless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Martin v. Wilks*, 490 U.S. 755, 763 (1989), *citing Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 441 (1934). *Accord, Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969).

Each of the 33 States appeared in district court not out of prudence and caution but out of a desire to be heard on the merits of an issue in which it was deeply interested by virtue of its adoption of the *NAAG Guidelines*. The States' uninvited and spontaneous effort to influence the outcome of the litigation belies the United States' suggestion, *see* U.S. Br. 15-16, that, as to some of the States, there may have been no "real, substantive controversy between parties having adverse legal interests." *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945).

2. The United States, although arguing that the Fifth Circuit erred in treating the 33 States as intervenors, *see* U.S. Br. 17-18, fails to explain in what alternative capacity it believes the States did appear. Under the Federal Rules of Civil Procedure and by long judicial tradition, a person not named or served as a party who nevertheless participates in a civil action in federal district court by filing pleadings, requesting or opposing relief, and appearing through counsel at oral argument, must do so in one of only two capacities, *i.e.*, as an intervenor or as an *amicus curiae*. *See generally* 1B *Moore's Federal Practice*, ¶ 0.411[6], at 442-43 (2d. 1991). There is no third

slot available for officious intermeddlers who seek to participate and be heard in the manner of parties without either assuming the risks of an intervenor or accepting the limitations of an *amicus*. *See United States v. Michigan*, 940 F.2d 143, 161-67 (6th Cir. 1991).

Consequently, the courts below, if they were to give effect to the 33 States' evident desire to take an active part in the proceedings, had to treat the States either as intervenors or as *amici*. This was something of a dilemma, for the States arguably looked like neither: they had not moved to join as intervenors, nor had they sought consent of the parties and moved to appear as *amici*. But this was, after all, a dilemma of the States' own making, and they should not now be heard to complain that it was not resolved to their complete satisfaction.

In any event, because the 33 States did not ask leave to appear as *amici*, because they satisfied the substantive requirements for permissive intervention under Fed. R. Civ. P. 24(b), and because they vigorously participated in the manner of parties, it was eminently reasonable to treat them as intervening defendants rather than as *amici*. Even when participation as *amicus* has been formally sought, a "district court lacking joint consent of the parties should go slow in accepting . . . an amicus brief." *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). *A fortiori*, when such participation has *not* been sought, it should not be granted.

At bottom, the 33 States were hoping to have their cake and eat it too. They wanted to participate in the proceedings in district court in the manner of full-blown parties while at the same time retaining the limited exposure of *amici*. The courts below correctly refused to sanction this inequitable and unorthodox maneuver. As the Ninth Circuit has explained, one who has intervened in substance has intervened in fact:

> the appellant never presented the court with a formal motion to intervene, but instead filed objections to appellees' summary judgment motion. The court properly viewed appellant's objections as a formal entry into the case . . . .

Adams v. Morton, 581 F.2d 1314, 1318 (9th Cir. 1978). *See also, e.g., In re Grand Jury Proceedings*, 654 F.2d 268, 271 (3d Cir.), *cert. denied*, 454 U.S. 1098 (1981). The 33 States, like the appellant in *Adams*, were properly viewed as intervening parties.

The United States further argues that even if the courts below were correct in treating the 33 States as intervenors, they erred in refusing to give effect to the States' purported reservation of a defense of lack of personal jurisdiction. U.S. Br. 16-17, 19-23. That argument is completely meritless. An intervenor has no defense of lack of personal jurisdiction: "the intervenor submits himself to the personal jurisdiction of the court by seeking to intervene in the action and cannot move to dismiss on that ground." 7C Wright, Miller & Kane, *Federal Practice & Procedure* § 1920 at 490 (1986). This rule reflects common sense: it would be both logically inconsistent and potentially abusive to allow litigants who have aggressively invoked the court's jurisdiction to claim in the same breath that that jurisdiction cannot be exercised to their detriment. *See Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985) (" 'the possibility that the plaintiff will be able to obtain relief against the intervenor-defendant' is part of the 'price' paid for intervention"), *citing District of Columbia v. Merit Systems Protection Bd.*, 762 F.2d 129, 132 (D.C. Cir. 1985). The court below did not err in following this settled rule. There is, moreover, no federal appellate authority to the contrary.

CONCLUSION

For the reasons stated here and in the brief in opposition, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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